Filed 2/18/05 P. v. Smith CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BILL HAROLD SMITH, Defendant and Appellant.	H027180 (Santa Clara County Super. Ct. No. CC243793)

I. INTRODUCTION

After a court trial, defendant Bill Harold Smith was convicted of one felony count of distributing or exhibiting harmful matter to a minor (Pen. Code, § 288.2, subd. (a))[1] and two misdemeanor counts of annoying or molesting a child (§ 647.6, subd. (a).) The trial court sentenced defendant to serve four years in the state prison on the felony offense, and two 90-day terms in the county jail on the misdemeanor offenses. The trial court also ordered defendant to submit to HIV testing pursuant to section 1202.1 and DNA testing pursuant to section 296.

On appeal, defendant contends the trial court erred by (1) misapplying the element of section 288.2, subdivision (a), that requires intent to seduce a minor; (2) failing to obtain defense counsel's express waiver of a jury trial; (3) failing to give defendant a

[1] All further statutory references are to the Penal Code unless otherwise indicated.

meaningful opportunity to object to the trial court's sentencing choices; (4) requiring HIV testing pursuant to section 1202.1 although there was no evidence of sexual contact between defendant and A. N.; and (5) requiring DNA testing pursuant to section 296, subdivision (a), in violation of defendant's Fourth Amendment right against unreasonable searches.

The People concede that the trial court erred in ordering defendant to submit to HIV testing. We agree, and therefore we will order that the abstract of judgment be modified. As modified, we shall affirm the judgment as we conclude that defendant's remaining contentions lack merit.

II. BACKGROUND

A. *The Information*

The information charged defendant with two felonies, distributing or exhibiting harmful matter to a minor, A.N.[2] (count 1; §288.2, subd. (a)), and distributing or exhibiting harmful matter to a minor, A. (count 2; §§ 288.2, subd. (a) & 313).[3] Defendant was also charged with two misdemeanors, annoying or molesting a child, A.N.

[2] The information refers to A.N. as Jane Doe I and to A. as Jane Doe II.

[3] Section 288.2, subdivision (a), provides in pertinent part, "Every person who, with knowledge that a person is a minor, or who fails to exercise reasonable care in ascertaining the true age of a minor, knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit by any means, including, but not limited to, live or recorded telephone messages, any harmful matter, as defined in Section 313, to a minor with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent or for the purpose of seducing a minor, is guilty of a public offense and shall be punished by imprisonment in the state prison or in a county jail." Section 313, subdivision (a), provides, "'Harmful matter'" means matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors."

(count 3; § 647.6, subd. (a), and annoying or molesting a child, A. (count 4; § 647.6, subd. (a)).[4]

Additionally, the information alleged that defendant had been convicted of five prior serious or violent felonies within the meaning of the Three Strikes law (§§ 667, subd. (b) - (i); 1170.12), including one conviction of assault with a firearm (§ 245, subd. (a)(2)) and four burglary convictions (§ 459).

B. *The Court Trial*

Defendant waived his right to jury trial, admitted his prior strike convictions, and agreed to a court trial on evidence limited to the preliminary hearing transcript, the documentary evidence, and his own testimony. Our summary of the facts underlying defendant's offenses is taken from this evidence and set forth in the light most favorable to the judgment. (See *People v. Valencia* (2002) 28 Cal.4th 1, 4.)

Victim A. N.

According to the police report, victim A.N., age 15, was a resident of an adolescent treatment facility when she began corresponding with defendant. A.N. told the investigating police officer that she met defendant, age 42, when she was in the eighth grade. At that time, A.N. was living at home and attending school with defendant's nieces and nephews. They would gather at defendant's house after school to watch movies. A.N. also went camping with defendant, whom she called "Smitty." A.N. admitted to being sexually active, but denied any sexual relationship with defendant.

A.N. initiated the correspondence with defendant. Her letters concerned her activities at the adolescent treatment facility and were not sexual in nature. Defendant's letters to A.N. became sexual in December 2001. A.N. also received letters from Katrina,

---

[4] Section 647.6, subdivision (a), provides, "(a) Every person who annoys or molests any child under the age of 18 shall be punished by a fine not exceeding one thousand dollars ($1,000), by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment."

defendant's girlfriend, but she stopped writing back when Katrina's letters became sexual. Katrina and defendant wrote to another fifteen-year-old girl at the adolescent treatment facility, A., after A.N. gave them A.'s address. A. ceased her correspondence with defendant when his letters became sexual.

Defendant's Letters

The documentary evidence included a number of letters written by defendant to A.N. and A., which were admitted into evidence at the preliminary hearing through the testimony of the police officers who had acquired the letters in the course of their investigation of defendant's alleged offenses.[5] The investigation began after staff at the adolescent treatment facility intercepted several letters with inappropriate sexual content that were addressed to A.N. and A. and signed "Smitty" and "Katrina," and reported the letters to the police.

The trial court summarized the sexual content of defendant's letters to A.N. as follows: "Now, in all his letters there seems to be a common character that he draws of a person's face where their tongue is hanging out, drooling. [¶] And I note that in some of the letters there are some of the quotes that I gleaned from the letters: Quote, I want you in so many ways. Peaches and cream. Give me some of that loving. Sweet young thing. Dirty thoughts. Thinking of you. Regret that we did not make love. I could use a lot more than a hug. Hey Sexy.

"The next one: . . . he talks about oral sex . . . quote, . . . Hey, you sweet thing; again, peaches and cream. Feelings of lust. Grinding on you. Always lustful thoughts. [¶] Another letter deals with part of the fun is bondage. Quote, statements [that] he wants to lick her. And then a statement that he needs . . . and then he uses a word to describe the female vagina."

[5] The record reflects that 12 letters were admitted into evidence at the court trial.

Defendant explained the nature of his relationship with A.N. and his purpose in writing the letters to A.N. and A. in his trial testimony.

Defendant's Testimony

Defendant acknowledged that he had spent much of his life in custody. He coped with imprisonment by writing letters to pen pals all over the world. Because he knew what it was like to be imprisoned, defendant wrote to A.N. at her request after she telephoned him from the place where he understood she was "locked up." Defendant had met A.N. before she was locked up because his nephew was her old boyfriend. They became better acquainted when defendant took A.N. to a beach party in Half Moon Bay. During the car ride, A.N. talked to defendant about her life, including sexual matters. Defendant felt that A.N. understood him better than anyone he had ever met. However, he never attempted to have sex with A.N. or touch her sexually because he is vehemently opposed to sex with minors.

With regard to the letters, defendant explained that mail is very important to prisoners: "[B]asically the only thing you have is that mailman five days a week. You sit there and you watch for the mailman, you listen for the mailman, you get the fact that the mailman is the only contact you have with the free world." For that reason, he engaged in correspondence with A.N. with the hope that "my letters would help her do her time easier." For example, defendant attempted to take A.N. out of the jail cell in her mind by describing what he could see outdoors when he was camping.

Defendant admitting writing letters with sexual content to A.N. In his experience, women prisoners want letters about sex, because they have been deprived of sex and letters with sexual content let them know they are loved and not forgotten. Defendant started writing what he described as "smut" to A.N. after meeting Katrina, who became his girlfriend. Some of the letters were written when he and Katrina were high on methamphetamine. After his arrest, defendant reviewed the letters with amazement. He did not realize he was writing letters like that at the time he wrote them.

Defendant denied that he wrote to A.N. with the intent to seduce her. He only wrote the letters for the purpose of giving her something to think about. "It was to help her do her time. Make her feel better while she was doing her time. You know? And actually I was hoping she would help me with my being out there. I was telling her things that happened in my every day life, you, about my stuff I was going through."

In a letter to the trial court that defense counsel read into the record, defendant stated that he understood that "things got way out of hand" in his correspondence with A.N. "I should not have sent the letters but I was thinking that she would really enjoy them. [¶] She did tell me she liked them letters on the phone." However, defendant emphasized that he wrote the letters under the influence of drugs and that he only wrote A.N. what he himself liked to hear about sex and someone wanting to be in a relationship with him. All he intended to do was help A.N. serve her time.

The Verdict

The trial court found defendant guilty beyond a reasonable doubt on count one, distributing or exhibiting harmful matter to a minor, A.N. (§ 288.2, subd. (a).) After the People dismissed count two, the charge of violating section 288.2, subdivision (a), with respect to A., the court also entered guilty verdicts on count three, annoying or molesting a minor (A.N., § 647.6, subd. (a)), and count four, annoying or molesting a minor (A., § 647.6, subd. (a).)

With respect to count one, the trial court determined that the evidence satisfied all elements of a section 288.2, subdivision (a), offense. The testimony established that defendant knew that A.N. was a minor, and the letters constituted "harmful material with the intent of arousing, appealing to, or gratifying the lust or desire of that person or the minor . . . with the intent or for the purpose of seducing the minor." Although defendant had testified that he only wanted to convey to A.N. that he had not forgotten her, the trial court determined that "he really wasn't forgetting about her in a sexual sense, too, which is, of course, the harm to her."

Sentencing

At the sentencing hearing, the trial court announced its tentative decision as follows. First, after concluding that a life sentence would be unjust, the trial court indicated its intention to strike the four prior convictions for burglary (§ 459) in the interests of justice pursuant to section 1385. The trial court did not intend to strike the prior conviction of assault with a firearm. (§ 245, subd. (a)(2).) Second, the trial court proposed a sentence of double the base term on count one, distributing or exhibiting harmful matter to a minor (A.N., § 288.2, subd. (a)), for total term of 32 months, as well as a restitution fine of $800. Third, the trial court noted that both sex offender registration under section 290 and a three-year parole period were required.

Defense counsel asked the trial court to also strike the prior conviction for assault with a firearm on the ground that defendant was not within the spirit of the Three Strikes law for a variety of reasons. The district attorney disagreed, and asserted that defendant was not entitled to the base term on count one in light of his record of eight felony convictions, 22 misdemeanor convictions, and seven parole or probation violations. Instead, the district attorney requested that defendant be sentenced to no less than four years, which is double the midterm of two years. (§§ 18, 667, subd. (e)(1).)

After hearing argument, the trial court struck the four prior convictions for burglary in the interests of justice and imposed a prison sentence of the midterm of four years on count one, with a total credit for time served of 957 days. The trial court then ordered defendant to pay a restitution fine of $800, suspended, and restitution in an amount to be determined. Defendant was also ordered to register pursuant to section 290 upon his release from custody, and to provide two blood and saliva samples for DNA testing pursuant to section 296 and HIV testing pursuant to section 1202.1.

The trial court also ordered defendant to serve 90 days in the county jail on each of the two misdemeanor charges of annoying or molesting a minor (counts three and four,

§ 647.6, subd. (a)), to be served concurrently. The trial court deemed the sentence to be completed because defendant had 90 days credit for time served on each misdemeanor.

III. DISCUSSION

A. *Section 288.2, Subdivision (a)*

Defendant contends that the judgment of conviction on count one must be reversed because it is based upon the trial court's erroneous interpretation of section 288.2, subdivision (a).

Section 288.2, subdivision (a), provides in pertinent part, "Every person who, with knowledge that a person is a minor, or who fails to exercise reasonable care in ascertaining the true age of a minor, knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit by any means, including, but not limited to, live or recorded telephone messages, any harmful matter, as defined in Section 313, to a minor with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent or for the purpose of seducing a minor, is guilty of a public offense and shall be punished by imprisonment in the state prison or in a county jail."

Defendant claims that the trial court misapplied the element of intent to seduce in section 288.2, subdivision (a), as shown by the court's statement that defendant "really wasn't forgetting about her [A.N.] in a sexual sense, too, which is, of course, the harm to her." In defendant's view, "[t]he only reasonable interpretation of this statement is that [defendant] was harming the minor by sending her inappropriately sexual material. Nothing in this statement implies in any way that the court was finding that appellant actually intended to convince the minor to have sexual intercourse with him."

This court has ruled that the intent to seduce element of a section 288.2, subdivision (a), offense "requires that the perpetrator intend to entice the minor to engage in a sexual act involving physical contact between the perpetrator and the minor." (*People v. Jensen* (2003) 114 Cal.App.4th 224, 239-240.) The defendant need not have

intended " 'heterosexual intercourse involving penetration of the vagina by the penis.' " (*Id*. at p. 239.) However, it is insufficient to show that the defendant's distribution or exhibition of harmful material was intended merely to lead the minor astray or to induce the minor to masturbate alone. (*Id*. at pp. 239, 241.)

We evaluate the trial court's statement under the following rule: "Ordinarily, statements made by the trial court as to its reasoning are not reviewable. An exception to this general rule exists when the court's comments unambiguously disclose that its basic ruling embodied or was based on a misunderstanding of the relevant law." (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1440; see also *People v. Ortiz* (1964) 61 Cal.2d 249, 253; *People v. Butcher* (1986) 185 Cal.App.3d 929, 936.) Having reviewed the entire record and the trial court's comments as a whole, we do not agree that the statement singled out by defendant unambiguously discloses that the court misunderstood or misapplied the intent to seduce element of section 288.2, subdivision (a).

The trial court also expressly stated that defendant's letters to A.N. constituted "harmful material with the intent of arousing, appealing to, or gratifying the lust or desire of that person or the minor . . . with the intent or for the purpose of seducing the minor." The trial court's subsequent remark, "he really wasn't forgetting about her in a sexual sense, too, which is, of course, the harm to her," implied that the trial court did not find entirely credible defendant's claim that he only wanted to be A.N.'s platonic friend. The trial court selected quotations from defendant's letters that showed defendant also intended to entice A.N. to physical sexual contact with defendant upon her release from "lock up": "Thinking of you. Regret that we did not make love. I could use a lot more than a hug. Hey Sexy. [¶] . . . [¶] Quote, statements [that] he wants to lick her. And then a statement that he needs . . . and then he uses a word to describe the female vagina."

Our review of defendant's letters to A.N. reveals that defendant's letters contain evidence of defendant's intent to seduce A.N. in addition to the excerpts placed on the record by the trial court. In one letter, defendant wrote, "I do regret the fact that we

didn't actually make love. [I] do recall holding you & that was wonderful. I still wish we would of done more." In another letter, defendant told A.N., "You are young but your company is wonderful. I enjoyed my time with you. I'm hoping that we can … have more good times." In a more explicit third letter, defendant wrote, "Girl I been thinking about that dance thing you told me about. Yes love to come dance with you. I hope you know that I am a slow dancer and believe me I am longing on grinding on you." Still more explicitly, defendant also wrote, "I believe you said your [sic] quite good at oral sex. You told me lots of things & I want it All!" and "Please take the time to enlighten me on what you would like & so on. Lots of details. Can you handle that?"

The excerpts from defendant's letters reflect the evidence that led to the trial court's statement that defendant had not forgotten A.N. "in a sexual sense, too, which is, of course, the harm to her." We do not construe the trial court's statement to indicate the trial court's misapplication or misunderstanding of the intent to seduce element. To the contrary, this statement, along with the trial court's express finding that defendant's letters to A.N. constituted "harmful material with the intent of arousing, appealing to, or gratifying the lust or desires of that person or the minor . . . with the intent or for the purpose of seducing the minor," demonstrate that the trial court properly interpreted and applied the intent to seduce element of section 288.2, subdivision (a).

For these reasons, we reject defendant's contention that the judgment of conviction on count one must be reversed because it is based upon the trial court's erroneous interpretation of section 288.2, subdivision (a).

B. *Jury Trial Waiver*

Defendant claims that his jury trial waiver was invalid because defense counsel never expressly waived the right to jury trial, although defense counsel was present when defendant stated his waiver in open court and represented defendant throughout the court trial without objection. Defendant's waiver included the following colloquy:

"THE COURT: Do you waive your right to a jury trial as I've explained it to you?

"THE DEFENDANT: Yeah. Goodbye jury.

"THE COURT: Just say yes or no.

"THE DEFENDANT: Yes."

The trial court did not ask whether defense counsel also waived the right to a jury trial, and defense counsel did not state an express waiver. Defendant contends that an express waiver by counsel is required by article I, section 16 of the California Constitution, which provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. . . ."

We are not persuaded that defense counsel's waiver cannot be implied. Case law under the identically worded predecessor to this constitutional provision (Cal. Const., art. I, former § 7) establishes that "where an express waiver has been received from the defendant, the acquiescence of defense counsel and the prosecutor will be given effect as implied waivers. It is only the waiver of the defendant himself that must be expressed in language. [Citations.]" (*People v. Evanson* (1968) 265 Cal.App.2d 698, 701; see also *People v. Robison* (1961) 193 Cal.App.2d 410, 413; *People v. Marshall* (1960) 184 Cal.App.2d 535, 538; *Campbell v. Municipal Court* (1960) 183 Cal.App.2d 790; *People v. Brooks* (1957) 154 Cal.App.2d 631, 634; *People v. Noland* (1939) 30 Cal.App.2d 386, 388-389; cf. *People v. Peace* (1980) 107 Cal.App.3d 996, 1008.)

Defendant's argument relies upon several decisions that are distinguishable because only the lack of an express waiver *by the defendant* was at issue. The requirement that a defendant's waiver of the right to jury trial must be expressed in open court was established in *People v. Garcia* (1929) 98 Cal.App. 702, 704-705.) In *People v. Holmes* (1960) 54 Cal.2d 442, 443-444, the California Supreme Court ruled that a waiver of the right to jury trial could not be implied from the defendant's conduct. In *People v. Ernst* (1994) 8 Cal.4th 441, 448-449, the court held that the failure to obtain an

express jury waiver from the defendant as required by the California Constitution was not subject to harmless error review; rather, it constituted structural error that was reversible per se. *Ernst* does not suggest that our Supreme Court has disapproved or overruled the line of cases that addressed the failure to obtain *counsel's* express consent on the record.

Defendant also cites *People v. Vera* (1997) 15 Cal.4th 269, 278, where the court observed: "The requirement [of article I, section 16] that a defendant and defense counsel personally and expressly waive the right to jury trial describes the manner in which a criminal defendant who wishes to waive this 'inviolate' right may do so, and constitutes the only method by which the constitutional right to jury trial may be waived in a criminal case. [Citation.]" Defendant claims that the California Supreme Court in *Vera* made clear that a valid jury waiver also requires an express waiver by defense counsel. We disagree.

The California Supreme Court's statement in *Vera* was dicta because only the lack of an express waiver by the defendant was at issue in that case. Moreover, our Supreme Court has never overruled or disapproved the line of cases that permit an implied waiver by defense counsel. For these reasons, we are convinced that the ruling in *Vera* did not affect the settled state of the law on this issue. Thus, where "defendant unequivocally expressed his waiver of a jury trial in the presence of his counsel and the latter thereafter continued to represent him throughout the trial without indicating any objection, his counsel has in effect joined in the waiver." (*Campbell v. Municipal Court*, *supra*, 183 Cal.App.2d at p. 794.)

In the present case, the record reflects that defense counsel was present when defendant stated his waiver in open court and represented defendant throughout the court trial without objection. Defense counsel's acquiescence in defendant's express waiver of the right to a jury trial constituted an implied waiver. Since both defendant and defense counsel effectively waived the right to jury trial, defendant's jury trial waiver was valid.

C. *Sentencing*

Defendant seeks a remand for a new sentencing hearing on the sole ground that the trial court denied him a meaningful opportunity to object to the court's sentencing choices, thereby violating his due process right to be heard at sentencing. In particular, defendant complains that the trial court refused to hear his objection to the sentencing choice of double the middle term on count one (A.N., §288.2, subd. (a).) As defendant explains, "[w]hile it is true that defense counsel commented on the court's initial tentative ruling, there was no reason for her to address the propriety of imposing the middle term rather than the lower term, since the court had indicated that it was imposing the lower term. Appellant had no meaningful opportunity to object to the trial court's sentencing choice of imposing the middle term."

The California Supreme Court has instructed that a defendant must be given "a meaningful opportunity to object" to the sentence the trial court intends to impose and to seek " 'clarification or change' [citation omitted] 'by objecting to errors in the sentence.'" (*People v. Gonzalez* (2003) 31 Cal.4th 745, 752, quoting *People v. Scott* (1994) 9 Cal.4th 331, 356.) This requirement is satisfied "*if*, at *any time* during the sentencing hearing, the trial court describes the sentence it intends to impose and the reasons for the sentence, and the court thereafter considers the objections of the parties before the actual sentencing." (*People v. Gonzalez*, *supra*, 31 Cal.4th at p. 752.)

During the sentencing hearing in the present case, the trial court indicated that its tentative decision was to strike four of the five prior strike convictions and to double the base term for a sentence of 32 months on count one. Thereafter, defense counsel commented on the requirement of sex offender registration under section 290. Defense counsel then asked the court to also strike the fifth prior strike conviction, because defendant's prior convictions were old and his more recent parole or probation violations were less serious than they first appeared. Defense counsel also explained that defendant

wanted to move to Oregon upon his release for the laudable purpose of taking care of his mother.

At the conclusion of defense counsel's comments, the district attorney requested a longer sentence of four years, or double the midterm of two years, in light of defendant's multiple prior convictions. Defense counsel did not object. The trial court then imposed the four-year term rather than 32-month term originally proposed. At that point, defense counsel requested, "Your Honor, may I make a comment in response?" The trial court refused the request, stating, "You've commented. Thank you." After the trial court finished announcing its sentencing orders, the following colloquy took place:

"[DEFENSE COUNSEL]: Your Honor, can we approach for a moment?

"THE COURT: No.

"THE DEFENDANT: Can I say something, Your Honor?

"THE COURT: No. Case is over.

"THE DEFENDANT: Can I still say something?

"THE COURT: No. Take him."

On this record, we do not find that defendant was deprived of a meaningful opportunity to object to the sentence the trial court intended to impose and to seek clarification or change by objecting to errors in the sentence, as required by *People v. Gonzalez*, *supra*, 31 Cal.4th at p. 752. While it is true that the trial court did not announce a tentative decision to impose a four-year sentence of double the midterm on count one, the district attorney requested that sentence during argument. Therefore, defendant was apprised of the possibility of a four-year term before the trial court announced its final sentencing decision.

However, the record reflects that defendant did not immediately object when the district attorney sought a sentence of double the midterm of two years. We also observe defendant has not asserted any errors in the sentence, or claimed that he was denied the opportunity to make any particular objections during the sentencing hearing. Defendant

merely asserts, "It is obvious that this was a close call for the trial court itself, since it initially indicated that it was imposing the lower term, not the middle term. It is more likely than not that had [defendant] been given a meaningful opportunity to address this sentencing decision the trial court would have been persuaded that its original decision was the correct one." Thus, defendant seeks remand for the purpose of persuasion, rather than the opportunity to object to an error in the sentence.

For these reasons, we determine that defendant was not deprived of a meaningful opportunity to make objections to the trial court's tentative sentencing choices, and a remand for a new sentencing hearing is not warranted.

D. *HIV Testing*

Defendant contends that the order requiring him to submit blood and saliva samples for HIV testing must be reversed because there is not probable cause to believe that defendant transferred blood, semen, or other bodily fluids capable of transmitting HIV, to A.N.

Section 1202.1, subdivision (a), provides that persons convicted of certain sexual offenses shall be ordered to "submit to a blood test or oral mucosal transudate saliva test for evidence of antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS)" if the defendant is convicted of a sexual offense listed in subdivision (e) of section 1202.1.[6]

---

[6] Section 1202.1, subdivision (a) provides, "(a) Notwithstanding Sections 120975 and 120990 of the Health and Safety Code, the court shall order every person who is convicted of, or adjudged by the court to be a person described by Section 601 or 602 of the Welfare and Institutions Code as provided in Section 725 of the Welfare and Institutions Code by reason of a violation of, a sexual offense listed in subdivision (e), whether or not a sentence or fine is imposed or probation is granted, to submit to a blood or oral mucosal transudate saliva test for evidence of antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS) within 180 days of the date of conviction. Each person tested under this section shall be informed of the results of the blood or oral mucosal transudate saliva test."

The sexual offenses listed in subdivision (e) of section 1202.1 include the following: "(1) Rape in violation of Section 261 or 264.1. [¶] (2) Unlawful intercourse with a person under 18 years of age in violation of Section 261.5 or 266c. [¶] (3) Rape of a spouse in violation of Section 262 or 264.1. [¶] (4) Sodomy in violation of Section 266c or 286. [¶] (5) Oral copulation in violation of Section 266c or 288a."

Under subdivision (e)(6)(A), the qualifying sexual offenses also include "any of the following offenses if the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim: [¶] (i) Sexual penetration in violation of Section 264.1, 266c, or 289. [¶] (ii) Aggravated sexual assault of a child in violation of Section 269. [¶] (iii) Lewd or lascivious conduct with a child in violation of Section 288. [¶] (iv) Continuous sexual abuse of a child in violation of Section 288.5. [¶] (v) The attempt to commit any offense described in clauses (i) to (iv), inclusive."

The People concede that the order for HIV testing was unauthorized. They note that defendant was convicted of a violation of section 288.2, subdivision (a), which is not included in the sexual offenses specified by section 1202.1, subdivision (e)(6)(A). We find the concession appropriate. Where, as here, the defendant did not object to the imposition of an HIV testing order in the trial court, the order is nevertheless appealable on the ground that the defendant was not convicted of an offense enumerated in section 1202.1, subdivision (e). (See *People v. Butler* (2003) 31 Cal.4th 1119, 1126; *People v. Green* (1996) 50 Cal.App.4th 1076, 1090-1091.)

We need not reach the issue of whether there is probable cause to believe that defendant transferred blood, semen, or other bodily fluids capable of transmitting HIV, to A.N. Because defendant was not convicted of an offense enumerated in section 1202.1, subdivision (e), the order requiring HIV testing cannot be upheld. We will vacate the order and direct that the abstract of judgment be amended accordingly.

E. *DNA Testing*

Defendant challenges the order requiring him to submit blood and saliva samples for DNA testing pursuant to section 296, subdivision (a), on the ground that the order violates his Fourth Amendment right against unreasonable searches.[7]

Section 296, subdivision (a) provides, in pertinent part, "(a) The following persons shall provide buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples required pursuant to this chapter for law enforcement identification analysis: [¶] . . . [¶] (2) Any adult person who is arrested for or charged with any of the following felony offenses: [¶] (A) Any felony offense specified in Section 290 or attempt to commit any felony offense described in Section 290, or any felony offense that imposes upon a person the duty to register in California as a sex offender under Section 290."

Because defendant was convicted of a felony violation of section 288.2, he is required to register as a sex offender under section 290 subdivision (a)(2)(A) and is subject to DNA testing under section 296, subdivision (a). However, defendant contends that DNA testing under section 296, subdivision (a), is unconstitutional because (1) the nonconsensual taking of blood and saliva samples is a search for purposes of the Fourth Amendment; (2) even though defendant is a state prisoner, he retains a reasonable expectation of privacy in his body and the right to be free from searches and seizures that do not serve legitimate penological needs; (3) the seizure of DNA samples from prisoners does not serve any penological needs; (4) absent individualized suspicion of wrongdoing, a search violates the Fourth Amendment unless the special needs exception recognized in

[7] We note that defendant did not object to the DNA testing order in the trial court. The absence of an objection does not bar our consideration of the merits of the issue. As the court stated in *People v. Marchland* (2002) 98 Cal.App.4th 1056, an "appellate court may examine constitutional issues raised for the first time on appeal, especially when enforcement of a penal statute is involved." (*Id.* at p. 1061.)

Ferguson v. Charleston (2000) 532 U.S. 67, and *Indianapolis v. Edmond* (2000) 531 U.S. 32, applies; and (5) the special needs exception does not apply to DNA testing of prisoners because such testing has no purpose beyond general law enforcement.

As defendant acknowledges, this court rejected these arguments in *People v. Adams* (2004) 115 Cal.App.4th 243. Defendant urges a departure from our decision in *Adams* because that decision "rests on a false premise," that is, the proposition that convicted criminals do not enjoy the same expectation of privacy as non-convicts. According to defendant, "[i]f this were true, ex-convicts could be regularly rounded up without recourse to constitutional protection. Obviously, this is not the law."

This argument does not persuade us to depart from our decision in *Adams* or the decisions of other courts that have upheld the constitutionality of DNA testing of convicted criminals. (See, e.g., *People v. King* (2000) 82 Cal.App.4th 1363, 1370 [noting the defendant's failure to cite any decisions against providing blood samples pursuant to section 296]; *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 505 [noting the consistent rejection of similar challenges by courts in other jurisdictions]; *United States v. Kincade* (9th Cir. 2004) 379 F.3d 813, 830-831 [acknowledging the large number of courts that have upheld DNA testing statutes against Fourth Amendment challenges].)

As we emphasized in *Adams*, convicted criminals are a class of persons distinct from the general population. (*People v. Adams*, *supra*, 115 Cal.App.4th at p. 258.) We explained, "individuals who are required to give samples have been found guilty beyond a reasonable doubt of serious crimes such as murder, manslaughter, sexual assaults, assaults, and kidnapping (§ 296, subd. (a)(1)), either by a trier of fact or their own admission. One result of their crimes is that society has a vastly increased interest in their identities. 'The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as "legitimate." ' [Citation.] [Citation.] 'By their commissions of a crime and subsequent convictions, persons such as appellant have forfeited any legitimate expectation of privacy in their identities. In short, any

argument that Fourth Amendment privacy interests do not prohibit gathering information concerning identity from the person of one who has been convicted of a serious crime, or of retaining that information for crime enforcement purposes, is an argument that long ago was resolved in favor of the government.' [Citation.]" (*Id*. at p. 259.)

Thus, we do not agree that there must be a "special need" beyond general law enforcement purposes for DNA testing of convicted criminals to pass constitutional muster under the Fourth Amendment. Defendant's reliance on *Ferguson v. Charleston, supra,* 532 U.S. 67, and *Indianapolis v. Edmond, supra,* 531 U.S. 32, as authority for the application of the special needs exception to DNA testing of convicted criminals, is misplaced. Those decisions concerned searches of the general public, not convicted criminals. Because DNA testing under section 296 serves the purpose of "[d]eterrence and prevention of future criminality and accurate prosecution of past crimes," "courts have upheld DNA acts for the law enforcement purpose of solving crimes." (*People v. Adams*, *supra*, 115 Cal.App.4th at p. 258.)

Accordingly, we determine that the order requiring defendant to provide blood and saliva samples pursuant to section 296 did not violation the Fourth Amendment prohibition against unreasonable searches.

III. DISPOSITION

The order requiring defendant to provide blood and saliva samples for HIV testing pursuant to Penal Code section 1202.1, subdivision (a), is vacated. The superior court is directed to amend the abstract of judgment accordingly and to forward a certified copy to the Department of Corrections. In all other respects, the judgment is affirmed.

_____
BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

_____
MIHARA, J.

_____
MCADAMS, J.